
(2021) 07 CESTAT CK 0033

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 22118 Of 2015

ITC Freight Services Pvt. Ltd.

APPELLANT

Vs

C.C., C.E. And S.T-Cochin

RESPONDENT

Date of Decision : 26-07-2021

Acts Referred:

Finance Act, 1994 — Section 65A(2)(ii), 65(35), 65(105), 65(105)(h), 66, 67, 73(1), 76, 77(2), 78

Customs Act, 1962 — Section 14, 146(2)

Customs House Agents Licensing Regulations, 2004 — Regulation 2(c), 3

Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 — Rule 10

Citation : (2021) 07 CESTAT CK 0033

Hon'ble Judges : S.S. Garg, J;P. Anjani kumar, Technical Member

Bench : Division Bench

Advocate : Ravi Raghavan, Lakshmi Kumaran And Sridharan, P. Gopakumar

Final Decision : Allowed

Judgement

1. The present appeal is directed against the impugned order passed by the Commissioner of Service Tax, Cochin dated 31/12/2014 confirming the

demand of service tax of Rs. 84,81,190/- (Rupees Eighty Four Lakhs Eighty One Thousand One Hundred and Ninety only) under the category of

â??Customs House Agent Servicesâ? for the period 2008-2009 to June 2012 and Rs. 10,50,656/- (Rupees Ten Lakhs Fifty Thousand Six Hundred

and Fifty Six only) on margin earned on trading of freight for the period from July 2012 to March 2013 along with interest and penalty under Section

76 and 77(2) and 78 of the Finance Act, 1994. Briefly the facts of the present case are that the appellant is a private limited company and is mainly

engaged in the business of freight forwarding wherein it undertakes various activities in relation to transportation of goods in the course of

import/export by sea and air. Appellant is also authorized to act as Customs House Agent under Customs House Licensing Regulations 2004 and has

been granted license of Customs House Agent. Appellant has entered into contracts with M/s. Vodafone Essar group of companies for supply of

Freight Forwarding Services dated 28/08/2009 for Kerala Circle, the appellant also acts as CHA in terms of the work order entrusted by the

Vodafone entities which were subsequently converted into an item rate contract for provision of Customs House Agent Services. In terms of the

work order/item rate contract, the appellant provided CHA Services for import and export of goods wherein the scope of the work inter alia consists

of the following:

a) To process the customs clearance documents with Customs and Central Excise

b) To arrange to pay the customs duty and warehousing charges

c) To arrange Customs inspection/examination and co-ordinate the delivery

The appellant has also entered into an agreement dated 01/04/2010 with M/s. BPL Limited for integrated logistics service which includes freight

forwarding and clearing services and customs house agent services. Though the contract is a single contract for provision of both freight forwarding

and CHA services, but the terms of contract clearly demarcate the activity of CHA and rest of the activities as separate and distinct. Appellants have

also entered into an agreement with various Overseas Freight Forwarders or Foreign Console Agents for the purpose of shipment of merchandise

from the place of foreign customer destination to port of Lading in foreign country and vice versa in case of import or export as the case may be. As

per the arrangement, the appellant remits freight charges to the Overseas Freight Forwarders and usually marked as miniscule percentage as padding

to cover appellant's office expenses, and quote the same to importer in the form of CAN invoice. Appellant were collecting service tax amount

billed in the CAN invoice for the local charges barring the freight amount from its customers during the disputed period. After verification of the

financial records and the ST-3 returns of the assessee, Department observed that the appellants had collected only nominal charges in respect of

CHA services and other services and a sizable mark up was loaded in the freight charges and has evaded the service tax on CHA services. On this

premises based on the audit, a show-cause notice was issued for the period April

2008 to March 2013 proposing to demand service tax on different amount of freight collected under the category of Customs House Agent services invoking proviso to Section 73(1) of the Finance Act, 1994 along with interest and penalty. Appellant filed detailed reply to the show-cause notice and submitted the copies of various agreements entered into by the appellant with his clients and also submitted various copies of invoices. After following the due process, the Commissioner of Central Excise and Customs, Cochin passed the impugned order confirming the demand under the category of Customs House Agent Services for the disputed period. Aggrieved by the said order, appellant filed a Writ Petition No. W.P (C) No. 11496 of 2015 on 05/04/2015 before the Honâ??ble High Court of Kerala but the Honâ??ble High Court directed the appellant to file the appeal before CESTAT and thereafter they filed the present appeal.

2. Heard both the parties and perused the records.

3. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly

appreciating the factual and legal position regarding the services rendered by the appellant. He further submitted that the impugned order is contrary to

the binding judicial precedent decided by the Tribunal and the High Court. The learned counsel further submitted that in fact the activities of the

appellant was not classifiable under CHA Services upto 01/07/2012. He further submitted that freight forwarding is not an activity that a licensed

CHA is required to undertake to render the services of CHA. The activity of freight forwarding is undertaken by CHA, if at all, in addition to his

business of being CHA and not in the course of such business. The learned counsel also took us through the definition of CHA as prescribed in

Section 65(35) of the Finance Act, 1994. Custom House Agent is a person licensed temporarily or otherwise under the regulations made under sub-

section (2) of Section 146 of the Customs Act, 1962. Taxable service of CHA is defined in subclause (h) of Section 65(105) as services provided or to

be provided â??to any person, by a custom house agent in relation to the entry or departure of conveyances or the import or export of goods. He also

referred to the definition of CHA under the Customs House Agents Licensing Regulations, 2004 and as per regulations 3 â??no person shall carry on

business as a Customs House Agent relating to the entry or departure of

conveyance or the import or export of goods at any Customs station unless such person holds a license granted under these regulations. He further submitted that from the scope of CHA Services as prescribed under the Customs Act as well as Customs House Agent Regulation Act, the Freight Forwarding is an activity outside the scope of a CHA's business which is undertaken to get the goods transported from/to international boundaries to/from various ports. He further submitted that the activity of Freight Forwarding is not in any form or manner related to CHA's business nor is it required to be executed in the course of CHA's business. Rather the activity of freight forwarding is in relation to international freight, which transpires either prior to or subsequent to the actual business of CHA. He further submitted that this issue has been settled by various decisions of the Tribunal wherein it has been consistently held that freight forwarding does not form part of CHA service. It was further submitted that it is factually incorrect that the appellant have been charging a lumpsum amount in as much as separate amounts have been indicated in the CAN/Invoice for individual activities. Furthermore, the activities are separately provided depending upon the requirement of the customer and therefore principles of classification relevant for a composite service as per Section 65A (2) (ii) shall not be applicable in the instant case.

3.1. Learned counsel submitted that Freight charges are not paid for the provision of CHA Services hence the demand in the impugned order is not sustainable since the activities of the appellant do not amount to provision of CHA service as arranging transportation by air/sea is not part of the services of a CHA rather a separate taxable service by itself and accordingly the differential amount collected for arranging the freight cannot be part of the value of CHA service.

3.2. Learned counsel also referred to the explanation to Section 67 of the Finance Act, 1994 and submitted that only "any amount" that is "payable for the services provided or to be provided" shall be included in consideration. Therefore, where any amount received is not related to the services provided, such consideration cannot be included in Section 67. Such an attempt would be ultra vires Section 66 being the charging section and Section 67 being the valuation section.

3.3. The appellants further submit that in the present case, the freight amount is

not charged for providing CHA Service. Freight forwarding charges

are recovered independent of the CHA Service provided by the appellants to their customers.

3.4. Freight on import goods is subject to Customs duty in the first place and is considered as value of goods

It is submitted by the appellant that in terms of Section 14 of the Customs Act, 1962 read with Rule 10 of Customs Valuation (Determination of Value

of Imported Goods) Rules, 2007 the transaction value in the case of imported goods has to inter alia include cost of transportation to the place of

importation, insurance etc. It is a settled law that where an amount is considered as part of the value of goods, the same amount cannot be subjected

to service tax.

In this regard, reliance is placed on Notification No. 9/2011 dated 01/03/2011 which provides exemption to value equal to air freight w.e.f. 01/04/2011.

The appellant places reliance on the case of United Shippers Ltd. V. CCE, Thane-III, reported at 2015 (37) S.T.R. 1043 (Tri.-Mumbai) as affirmed

by the Honâ??ble Supreme Court in Commissioner v. United Shippers Ltd. reported at 2015 (39) S.T.R. 1369 (S.C) wherein it was held that amounts

which form part of the transaction value for the levy of customs duty should not be subject to service tax. He further submitted that ocean freight was

not liable to service tax and the same cannot be taxed under any other entry like CHA Services or Business Support Services. For this, he relied upon

the following decisions:

a) Gudwin Logistics V. CCE, Vadodara reported in 2010 (18) S.T.R. 348 (Tri.-Ahmd.)

b) Agility Logistics Pvt. Ltd. V. CST, Chennai â?" 2014 (35) S.T.R. 858 (Tri.-Chennai)

c) APL Logistics (India) Pvt. Ltd. V. CCE, Chennai-III â?" 2014 (36) S.T.R. 1310 (Tri.-Chennai)

3.5. The learned counsel further submitted that freight and freight forwarding of import/export cargo is not taxable under the Negative List Regime

(post 01/07/2012). He also submitted that freight amount collected from the customers is equal to the cost of the actual freight undertaken by the

carriers along with the margin charged by the appellants for arranging the international freight and international transportation of goods which has been

kept outside the service tax net in the Negative List Regime also. He further submitted that with regard to import freight there is a specific entry under

the Negative list in Section 66D which ensures that import freight is kept outside the service tax net as provided in sub-clause (ii) of clause (p) of

Section 66D. He also submitted that export freight is deemed to be provided outside the territory of India and is therefore not taxable under the

Service Tax as per the provisions of Section 66C of the Finance Act, 1994 read with Place of Provision of Services Rules, 2012. He placed reliance

on Circular No. 197/7/2016-S.T. dated 12/08/2016 which amply clarifies this position. The learned counsel further submitted that when a particular

activity in itself is not taxable, the margin earned in relation to such activity cannot be subject to tax since it would amount to transgressing the limits

laid down in the parent legislation as to the scope of a taxable service. For this, the learned counsel relied upon the following decisions wherein it has

been consistently held that profits made on an activity which is not a part of the taxable event cannot be subject to tax.

a) Greenwich Meridian Logistics (India) Pvt. Ltd. V. CST, Mumbai â?" 2016-TIOL-869-CESTAT-MUM.

b) Interfreight Services Pvt. Ltd. V. CST, Chennai â?" 2018-TIOL1565-CESTAT-Mad.

c) M/s. PVGT Freight Forwarders and Logistics Pvt. Ltd. V. CST, Chennai II Commissionerate â?" 2018-TIOL-3311-CESTAT-MAD.

d) M/s. LA Freight Pvt. Ltd. V. Commissioner of Service Tax, Chennai â?" 2018 (3) TMI 113-CESTAT CHENNAI

e) Seamax Logistics Ltd. V. CCE & ST, Tirunelveli â?" 2018 (7) TMI 262 CESTAT CHENNAI

f) K. Steamship Agencies Pvt. Ltd. V. CCE, Chennai-II Commissionerate â?" 2019-1-TMI-440-CESTAT CHENNAI

3.6. Learned counsel also questioned the invocation of extended period and submitted that the Department was fully aware of the activities carried out

by the appellant and appellants have submitted all the financial statements, agreements with customers and overseas freight forwarders which were

verified by the audit. He further submitted that the appellant had a bona fide belief that they are not liable to pay service tax on differential freight

amount collected. He further submitted that whole issue of leviability of service tax on freight forwarding activity is a skewed matter of interpretation

of the provisions and it was only after the decision of Bax Global India Ltd. V. CST, Bangalore reported in 2008 (9) S.T.R. 412 (Tri.- Bang.), the

activity of freight forwarding per se was held to be not includible in the CHA services.

4. On the other hand, the learned AR defended the impugned order and submitted that the amount charged in excess of actual freight incurred was liable to be included in the gross amount charged by the appellant. He further submitted that the sizeable portion amount of mark-up charges loaded in freight was to be treated as "trading of freight" which is considered as taxable service as trading in goods is only specified in Section 66D(e) of the Act for the period July 2012 to March 2013.

5. After considering the submissions of both the parties and perusal of the material on record and after perusal of the various agreements entered into by the appellant with his customers viz. Vodafone Essar Group of Company and BPL Ltd., we find that the appellant's activity or business

consists of three types of services viz:

- a) Exclusively providing Freight Forwarding Agent Services (only FFA)
- b) Exclusively providing Customs House Agent Services (only CHA) and
- c) Providing both Freight Forwarding and CHA Services (FFA + CHA)

5.1. Further we find that appellant is authorized to act as a CHA under Customs Housing Agent Licensing Regulations and has been granted a

license. Further, we find that the main revenue of the appellant comes from providing exclusive freight forwarding activity which accounts for

substantial income of the appellant. Before we further examine the activities of the appellant, it is necessary to reproduce the definition of

"CHA" as provided in the Finance Act, 1994 and also under Customs House Agents Licensing Regulations, 2004. Section 65(35) of the Finance

Act reads as follows:-

(35) "Customs House Agent" means a person licensed, temporarily or otherwise, under the regulations made under sub-section (2) of

Section 146 of the Customs Act, 1962 (52 of 1962).

Regulation 2(c) of the Customs House Agents Licensing Regulations, 2004 defines Customs House Agent as under:

(c) "Customs House Agent" means a person licensed under these regulations

to act as agent for the transaction of any business relating to the entry or departure of conveyances or the import or export of goods at any Customs Station. Further the taxable service of CHA is defined in sub-clause (h) of Section 65(105), which is reproduced herein below:

“(105) (h) to a client, by a custom house agent in relation to the entry or departure of conveyance or the import or export of goods.”

Perusal of the definition of “CHA” as provided in the Finance Act as well as in Regulation, we find that the scope of CHA service is restricted only to the licensed activities relating to either (a) entry or departure of conveyances at any Customs Station or (b) import or export of goods at any Customs Station. Further, we find from the definition of “CHA” Services that freight forwarding is an activity outside the scope of a CHA’s business, and freight forwarding is undertaken to get the goods transported from/to international boundaries to/from the Indian ports and the said activity is not in any way related to CHA’s business and CHA is not required to execute these services in the course of CHA’s business. We also find that this aspect has been considered by the Tribunal in the case of Bax Global India Ltd. Vs. CST, Bangalore cited supra wherein it has been held that the scope of the activity of a Custom House Agent is limited to the entry or departure of conveyances or import or export of goods at any customs station and does not extend beyond the same. Similarly, in the case of Lee & Muir Head Pvt. Ltd. V. CST, Bangalore reported in 2009 (14) S.T.R. 348 (Tri.-Bang.), it has been held that freight forwarding is not a part of a Custom House Agent’s activity and therefore cannot be charged to service tax under CHA Service. Further, in the case of DHL Lemuir Logistics Pvt. Ltd. V. Commr. of Service Tax, Bangalore reported in 2010 (17) S.T.R. 266 (Tri.-Bang.), the Tribunal has categorically highlighted that freight forwarding is an activity undertaken prior or post the business of a CHA and therefore does not form part of the taxable service of CHA service. Further, we find that the finding of the learned Commissioner that the activity of the appellant is a composite service and the main service out of the bundle of composite services is CHA service is factually incorrect because the appellants have not been charging a lumpsum amount rather the appellants have been charging separate amounts indicated in the CAN/Invoice for individual activities and the activities are separately provided

depending upon the requirement of the customer and therefore the principles of classification adopted by the learned Commissioner is not applicable in the instant case. Further, we find that as per Section 67 of the Finance Act, 1994 only "any amount" that is "payable for the services provided or to be provided" shall be included in consideration and any amount received is not related to the services provided cannot be included in Section 67. Further, we find that freight forwarding charges are recovered by the appellant independent of the CHA Service provided by them to their customers. Further, we find that the freight on import goods has been subject to Customs duty and is considered as value of goods as per Section 14 of the Customs Act, 1962 read with Rule 10 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 wherein it is provided that the transaction value in the case of imported goods has to inter alia include cost of transportation to the place of importation. Further, we find that it is a settled law that where an amount is considered as part of the value of goods, the same amount cannot be subjected to service tax as held by the Tribunal in the case of United Shippers and affirmed by the Hon'ble Apex Court cited supra. We also find that ocean freight has been kept outside the service tax and the decisions relied upon by the appellant in this regard clearly hold that ocean freight is not an activity which should be subjected to service tax. We also find that even after the introduction of Negative List, freight and freight forwarding is not taxable and when a particular activity is not taxable then the margin earned in relation to such activity cannot be subjected to tax as held by the Apex Court in the case of Baroda Electric Meters Ltd. V. Collector of Central Excise reported in 1997 (94) E.L.T. 13 (S.C) and consistently followed by the Tribunal in various decisions cited supra. We also find force in the submissions of the learned counsel for the appellant that in case of export freight, no service tax is payable because the said service is non-taxable service and is provided in a non-taxable territory. We also find that with regard to export freight, the Circular of the Board No. 197/7/2016-S.T dated 12/08/2016 amply clarifies this position. As far as extended period of limitation is concerned, we find that the ingredients mentioned in terms of proviso to Section 73(1) has not been fulfilled by the Department and moreover in the present case, the appellant has a bona fide belief that they are not liable

to pay service tax on the differential freight amount collected. We also find that the whole issue of leviability of service tax on Freight Forwarding

activity was not clear and it was only after the decision of Bax Global India Ltd. V. CST, Bangalore cited supra, the activity of Freight Forwarding per

se was held to be not includible in CHA Services. Therefore, we are of the opinion that the issue involved relates to interpretation of provisions of a

statute and in such a situation, extended period cannot be invoked.

6. In view of our discussion above, we are of the considered view that the impugned order is not sustainable in law and therefore, we set aside the

same by allowing the appeal of the appellant with consequential relief, if any as per law.

(Order was pronounced in Open Court on 26/07/2021)